

### **Remarks**

In view of the above amendments and the following remarks, the Examiner is respectfully requested to withdraw the rejections and allow claims 1-23, 25-34, and 44-54, the only claims pending and under examination in this application.

### **Formal Matters**

The claims have been amended to specify that the porous applicator is compliant. Support for this amendment can be found at paragraph 38, among other locations of the originally filed specification. As the above amendments introduce no new matter to the application, their entry by the Examiner is respectfully requested.

### **Rejections Under 35 U.S.C. § 102 (b)**

The Office Action states that Claims 1 – 7, 9 – 23, 25 - 29 and 31 – 33 are rejected under 35 USC § 102(b) as being anticipated by Sahota et al. (hereinafter "Sahota") and Fuller et al. (hereinafter "Fuller"). The Office Action states that both Sahota and Fuller disclose a device for localized contact of a fluid to a target site comprising a fluid delivery element, a porous region, and an aspiration element.

As stated in MPEP § 2131:

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

As reviewed in the Applicant's previous response, an element of the claimed invention is a porous region at the end through which the fluid must flow to contact the site and an aspiration element. The Merriam-Webster online dictionary defines "porous" as "possessing or full of pores." The same dictionary defines the word pore as "a minute opening." Accordingly, the word "porous" means full of minute openings.

In maintaining the rejection, the Examiner notes that Meriam-Webster online dictionary defines "porous" in one definition to be "permeable to fluids." The Examiner thereby asserts that "the devices of all of the prior art do indeed disclose a porous region at the end through which fluid must flow to contact the site."

However, tacit in the Examiner's preferred definition of "porous" is the sense that the fluids are permeable *through a plurality pores*. This implicit meaning is indicated by the Oxford English Dictionary (OED, at <http://www.oed.com/>). The OED definition of "porous" is copied below in its entirety:

## **Porous, a.**

SECOND EDITION 1989

Full of or abounding in pores; having minute interstices through which water, air, light, etc. may pass.

*porous plaster*, a plaster having numerous small holes pierced through it so as to enable it to lie smoothly (*Syd. Soc. Lex.*).

*c1400 Lanfranc's Cirurg.* 107 It schulde ben more rare & more porous [*v.r.* porose], þat is to seie, more ful of hoolis. **1567 J. MAPLET** *Gr. Forest* 33 It is nothing solide or massie, but much porouse. **1625 N. CARPENTER** *Geog. Del.* II. ix. (1635) 153 The Porous and spongy nature of the Earth is apt to drinke in the water of the sea. **1692 BENTLEY** *Boyle Lect.* 207 If gold it self be admitted, as it must be, for a porous concrete. **1794 SULLIVAN** *View Nat.* I. 359 Light, in its passage, penetrates the porous vacuities. **1879 RUTLEY** *Stud. Rocks* i. 5 Questions of water supply hinge mainly on the porous or impervious character of rocks.

## **b. fig.**

**1642 H. MORE** *Song of Soul* III. Pref., Many [arguments]..go through their more porous and spongy minds without any sensible impression. **1795 COLERIDGE** *Plot Discovered* 19 But our minister's..style is infinitely porous. **1864 CARLYLE** *Fredk. Gt.* XVI. vii. (1872) VI. 207 Men are very porous; weighty secrets oozing out of them, like quicksilver through clay jars.

## **c. Acting or performed by means of pores.**

1861 BENTLEY *Man. Bot.* (1870) 302 Porous dehiscence is an irregular kind of dehiscence.

The OED defines “pores” similarly as Merriam-Webster defines it; the OED definition is copied below in relevant part:

**pore, *n.***<sup>1</sup>

SECOND EDITION 1989

1. A minute opening, orifice, aperture, perforation, or hole (usually, one imperceptible to the unaided eye), through which fluids (rarely solid bodies) pass or may pass.

Furthermore, the OED defines “interstices” in relevant part as follows:

**interstice**

SECOND EDITION 1989

1. a. An intervening space (usually, empty); *esp.* a relatively small or narrow space, between things or the parts of a body (freq. in *pl.*, the minute spaces between the ultimate parts of matter); a narrow opening, chink, or crevice.

Finally, the specification of the present application clearly defines the porous structure in terms of porosity, such that it is a structure made up of or is full of holes. See paragraph 27 on page 6 of the specification. As recently confirmed by the Federal Circuit in *Phillips v. AWH Corp.*, Fed. Cir., Nos. 03-1269, 03-1286, July 12, 2005, if a claim term is in question, the specification's definition of the claim term is controlling.

As such, in view of the specification and the plurality of dictionary references above, since the claims in question require the presence of a porous region, they require the presence of an element that is full of holes.

Turning now to the cited references, Sahota does not disclose a device with a porous region at the end through which the fluid must flow to contact the site. The Examiner points to Figure 1 and Column 1, Line 47 to Column 2, Line 38 to support disclosure of a device comprising a porous region. The applicants respectfully traverse. Figure 1 teaches, *inter alia*, a device with a port 17 through which fluid passes in order to inflate a balloon, light aperture 24, and the distal tip of the device 23, which has a central lumen and light

apertures (unlabeled) around its perimeter (See Column 4, Lines 45-56). None of these openings can be construed as pores.

The Examiner also refers to the Summary of the Invention section, Column 1, Line 47 to Column 2, Line 38. The language discloses "an infusion port . . . for infusing a media with or without medication," but does not disclose a porous element. A single infusion port (depicted as **44** on Figure 3, and **86** on Figure 5) does not constitute "full of or abounding in pores." As such, Sahota does not disclose each and every element of the claimed invention.

Nonetheless, solely in order to expedite prosecution and while in no way agreeing with the Examiner, the claims have been amended to specify that the porous applicator is compliant, which amendment even further distinguishes the claims from the cited reference.

Therefore, Claims 1 – 7, 9 – 23, 25 - 29 and 31 – 33 are not anticipated by Sahota under 35 USC § 102(b), and this rejection may be withdrawn.

Fuller does not disclose a device with a porous region at the end through which the fluid must flow to contact the site. The Examiner points to Figure 1 and Column 3, Line 50 to Column 4, Line 42 to support disclosure of a device comprising a porous region. The applicants respectfully traverse. Figure 1 teaches, inter alia, a device with a fluid delivery element but no porous element or aspiration element. The cited language comprises the entire Summary of the Invention section, including Column 4, Line 36, which discloses a perforated tissue contact tip. A perforated tip does not constitute a porous element. A perforated tip comprises holes, but not minute holes or pores.

Nonetheless, solely in order to expedite prosecution and while in no way agreeing with the Examiner, the claims have been amended to specify that the porous applicator is compliant, which amendment even further distinguishes the claims from the cited reference.

As such, Fuller does not disclose each and every element of the claimed invention, Claims 1 – 7, 9 – 23, 25 - 29 and 31 – 33 are not anticipated by Fuller under 35 USC § 102(b), and this rejection may be withdrawn.

**Rejections Under 35 U.S.C. § 102 (e)**

The Office Action states that Claims 1, 8, 21, 29, 30, 31, 33 and 34 are rejected under 35 U.S.C § 102(e) as being anticipated by Brisken et al. (hereinafter “Brisken”). The Examiner asserts that Brisken “discloses a device (Figure 2A) comprising a fluid delivery element, a porous region, an aspiration element, and an external energy application element that is of sonic energy (Column 3, Line 15 - Column 5, Line 15).” These rejections are respectfully traversed in view of the following remarks.

As discussed above, the fluid delivery device claimed in the present application contains a porous region at the end of the device.

Figure 2A of Brisken does not disclose a device comprising a porous element. At best, Figure 2A shows lumen 24 that exits near the distal end 30. The port from which this lumen exits does not constitute a porous region, as defined by the OED. Specifically, the OED defines porous as being full or abounding in pores, and as having minute interstices. A terminal lumen opening does not meet this definition.

Moreover, the cited language, comprising the Summary of the Invention section, does not teach a device with a porous element through which fluid must flow. Column 3, Lines 59-65 teach a device having a lumen that terminates in a distal opening between the vibratory surfaces. Such distal termination openings of a central lumen do not constitute a porous region as defined by the OED. Specifically, the OED defines porous as being full or abounding in pores, and as having minute interstices. A terminal lumen opening does not meet this definition.

Nonetheless, solely in order to expedite prosecution and while in no way agreeing with the Examiner, the claims have been amended to specify that the porous applicator is compliant, which amendment even further distinguishes the claims from the cited reference.

As such, Briskin fails to teach or suggest a device with a porous region. Therefore, because Briskin does not disclose each and every element of the fluid delivery device of the claimed invention, Claims 1, 8, 21, 29, 30, 31, 33 and 34 are not anticipated by this patent under 35 U.S.C. § 102(e) and these rejections may be withdrawn.

The Office Action states that Claims 44-53 are rejected under 35 U.S.C. § 102(e) as being anticipated by Constantz et al. (hereinafter "Constantz"). The Examiner asserts that Constantz "teaches a system and a kit (Figures 1-4) for use in delivering a fluid to a target site (Column 2, Lines 8-22)." These rejections are respectfully traversed in view of the following remarks.

Constantz does not disclose a device comprising a porous element. Figures 1A and 1B show occluded vascular sites and no devices. Figure 2A shows an aspiration catheter, without teaching a porous element. Figure 2B shows a total occlusion catheter insert, without teaching a porous element. Figure 3 shows a partial occlusion catheter insert, without teaching a porous element. Figure 4 shows the use of a partial occlusion catheter insert, without teaching a porous element. Figure 4 teaches the use of a plurality of ports on the partial occlusion insert. The plurality of ports taught by Figure 4 does not constitute a porous element as defined by the specification and further supported by the OED. Specifically, the plurality of ports does not constitute an abounding amount of minute openings that are imperceptible to the unaided eye.

Furthermore, the cited language comprises the Summary of the Invention section and does not teach a device with a porous element.

Nonetheless, solely in order to expedite prosecution and while in no way agreeing with the Examiner, the claims have been amended to specify that the porous applicator is compliant, which amendment even further distinguishes the claims from the cited reference.

As such, because Constantz does not disclose each and every element of the fluid delivery device of the claimed invention, the system and kit of Claims 44-53 are not anticipated by this patent under 35 U.S.C. § 102(e) and these rejections may be withdrawn.

**Rejections Under 35 U.S.C. § 103 (a)**

The Office Action states that Claim 54 is rejected under 35 U.S.C § 103 as being obvious over Sahota or Fuller in view of Chia. As amended, the porous applicator is a compliant applicator. Sahota and Fuller are both deficient in teaching or suggesting such an element. As Chia was cited solely for its teaching of a porosity range, it fails to make up the deficiency in Sahota or Fuller. As such, this rejection may be withdrawn.



**CONCLUSION**

In view of the above remarks, this application is considered to be in good and proper form for allowance and the Examiner is respectfully requested to pass this application to issuance.

If the Examiner finds that a telephone conference would expedite the prosecution of this application, please telephone undersigned. The Commissioner is hereby authorized to charge any underpayment of fees associated with this communication, including any necessary fees for extensions of time, or credit any overpayment to Deposit Account No. 50-0815

Respectfully submitted,  
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